Nos. 79-1427, 79-1443, 79-6071, 79-6234, 79-6245,
79-6254, 79-6301

In the Supreme Court of the United States

OCTOBER TERM, 1979

Supreme Court, U.S.
FILED
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MICHAEL RODAK, JR., CLERK

RONALD K. PETERSEN and JAMES BALLOMEE,
PETITIONERS

v.

UNITED STATES OF AMERICA

JOEL LEE MITCHELL and DEE DUNCAN MITCHELL,
PETITIONERS

v.

UNITED STATES OF AMERICA

RICHARD CARLSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General

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[Captions Continued]

JAMES FRANKLIN DIXON, PETITIONER

v.

UNITED STATES OF AMERICA

ROBERT LEONHARDT, PETITIONER

v.

UNITED STATES OF AMERICA

RICHARD IGO, PETITIONER

v.

UNITED STATES OF AMERICA

JOHNNY MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

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No. 79-1427

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JOEL LEE MITCHELL and DEE DUNCAN MITCHELL,
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UNITED STATES OF AMERICA

No. 79-6071

RICHARD CARLSON, PETITIONER

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-47)[1] is reported at 611 F.2d 1313.

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[1] "Pet. App." refers to the appendix to the petition in No. 79-1427.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1979. Petitions for rehearing were denied on February 14, 1980. The petition for a writ of certiorari in No. 79-6071 was filed on February 11, 1980,[2] the petition in No. 79-6234 was filed on March 13, 1980, and those in Nos. 79-1427, 79-6245, and 79-6254 were filed on March 14, 1980. The petitions in Nos. 79-1443 and 79-6301 were filed respectively on March 17 and March 24, 1980, and are therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether co-conspirator statements were properly admitted into evidence.
2. Whether the evidence was sufficient to sustain the convictions of petitioners Leonhardt and Miller (Nos. 79-6245 and 79-6301).

STATEMENT

After a jury trial in the United States District Court for the District of Colorado, petitioners were convicted of conspiracy to transport stolen motor

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[2] Petitioner Carlson did not petition for rehearing in the court below; his petition is therefore out of time under Rule 22(2) of the Rules of this Court.

vehicles in interstate commerce, in violation of 18 U.S.C. 371, 2312, and 2. They were sentenced to varying periods of imprisonment. The court of appeals affirmed in a divided opinion (Pet. App. A-1 to A-47).

1. The evidence at trial, which is fully set out in the opinion of the court of appeals (Pet. App. A-3 to A-24), showed that petitioners, along with co-defendants Clarence Morrison, Judy Morrison, Joe Wilson, Jodie Malone, and Aaron Stevens, and co-conspirators Ronnie Adams, JoAnn Adams, and Jimmy Adams,[3] engaged in a wide-ranging conspiracy to steal and transport motor vehicles between Colorado, Texas, Nevada, California, and Mexico. Briefly, the evidence showed that salvage dealers such as Wilson and petitioner Joel Mitchell sold parts of automobiles, trucks, and campers to Clarence Morrison and his associates (Pet. App. A-3, A-14, A-22 to A-24). In addition to these parts—the vehicle identification number (VIN) plate and the stamped vehicle number on the frame rail—the "wrecking yard" dealers provided false title work and license plates (Pet. App. A-3, A-16 to A-17). Other members of the conspiracy selected vehicles for stealing; these

[3] Clarence and Judy Morrison did not appeal their convictions. Wilson, Malone, and Stevens did not petition for certiorari. Ronnie, Jimmy, and JoAnn Adams were granted immunity from prosecution in return for their testimony at trial.

vehicles were similar to those from which the VIN plates and other identification had been previously obtained in the wrecking yards (*id.* at A-3, A-13). Once stolen, the vehicles were taken to special garages, where the VIN plates were "popped" from the frame rail and replaced by the plates obtained from other conspirators. Several of the cars were also repainted (*id.* at A-3, A-5 to A-9, A-12 to A-15, A-18, A-20 to A-21). Once altered, the vehicles were sold to both knowing and innocent customers.

2. At the close of the government's case, in keeping with the then-prevailing standard in the Tenth Circuit, the trial court determined that there was prima facie evidence of a conspiracy. Later, at the close of the evidence, it instructed the jury that co-conspirators' statements could be considered against each defendant, including petitioners, if, as to each defendant, the jury found beyond a reasonable doubt the existence of a conspiracy and that defendant's participation in it (Pet. App. A-33 to A-34). After petitioners' trial, the court of appeals decided *United States* v. *Andrews*, 585 F.2d 961 (10th Cir. 1978), which modified the procedures for the receipt of co-conspirator testimony under Fed. R. Evid. 801(d)(2)(E).[4] On petitioners' appeal, the majority held,

[4] Under *Andrews*, the trial court is to make the admissibility decision, determining, under a preponderance of the evidence standard, whether a conspiracy has been proved. 585 F.2d at 965-966. The jury is not thereafter instructed on the admissibility of co-conspirator testimony.

inter alia, that *Andrews* was not to be given retroactive effect (Pet. App. A-29 to A-33). Judge McKay dissented on this point (Pet. App. A-44 to A-47).

ARGUMENT

1. Petitioners contend (79-1427 Pet. 4-8, 79-1443 Pet. 4-9, 79-6071 Pet. 4-5, 79-6234 Pet. 4-7, 79-6245 Pet. 5-7, 79-6254 Pet. 7-12, 79-6301 Pet. 8) that the court below should have given its *Andrews* decision retroactive effect. This claim was correctly rejected by the court below and does not merit further review.

The Tenth Circuit's decision in *Andrews* clearly worked a change in the procedures for determining the admissibility of co-conspirator testimony in the trial courts within the circuit. Prior to that change, the trial courts, after making a prima facie determination of the existence of a conspiracy, instructed the jury at the close of the evidence that co-conspirator statements could be considered against a given defendant only if the jury found, beyond a reasonable doubt, that a conspiracy existed, that the defendant was part of it, and that the statements had been made in furtherance of the conspiracy (see Pet. App. A-30). The procedure adopted by *Andrews*, however, vests the question of admissibility solely in the trial judge (*ibid.*). But this change occurred not because of the compulsion of constitutional right, or even because the old procedures were untrust-

worthy,[5] but rather because "the recently adopted Federal Rules of Evidence altered the procedural requirements in this area" (*id.* at A-33).

Review of petitioners' contention that they were improperly denied the benefit of the *Andrews* rule is inappropriate if, as is evidently the case, they suffered no prejudice from application of the co-conspirator hearsay rule previously followed in the Tenth Circuit, *i.e.*, if evidence initially admitted by the trial court under the "prima facie" standard would also have been admitted under the new *Andrews* standard. Here the court of appeals (Pet. App. A-38) examined the evidence and concluded that it met the *Andrews* standard; and further consideration of that fact-bound determination is not appropriate for review by this Court. In fact, petitioners evidently benefited from application of the pre-*Andrews* rule; for under that rule the trial court instructed the jury that it must finally make its own determination of the admissibility of co-conspirator declarations under a reasonable doubt standard (Pet.

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[5] The court below noted in this regard (Pet. App. A-32 to A-33):

> In our view, *Andrews* establishes a preferable manner in which to insulate a defendant from the danger of prejudice should the jury rely upon co-conspirators' statements which should not be attributed to him. Nevertheless, this danger of prejudice, in view of the actual precaution exercised in applying our prior rule, was not such as to require retroactivity. * * * Basically, our view is that the prior procedures sufficiently protected defendants from the dangers inherent in the admission of co-conspirator hearsay statements.

App. A-34 to A-35). *United States* v. *Enright*, 579 F.2d 980, 986-987 (6th Cir. 1978); *United States* v. *James*, 576 F.2d 1121, 1131 n.8 (5th Cir. 1978), modified, 590 F.2d 575 (en banc), cert. denied, 442 U.S. 917 (1979).

In any event, in declining to apply its *Andrews* decision retroactively, the court of appeals (A-31 to A-33) carefully followed the retroactivity analysis set out in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107 (1971), and decided the issue in accord with the decisions of all other circuits that have considered the question whether procedures adopted in conformity with Fed. R. Evid. 104(a) are to be given prospective application only. See *United States* v. *McPartlin*, 595 F.2d 1321, 1357 (7th Cir.), cert. denied, No. 78-1751 (Oct. 1, 1979); *United States* v. *James*, *supra*, 590 F.2d at 583; *United States* v. *Enright*, *supra*, 579 F.2d at 986-987; *United States* v. *Macklin*, 573 F.2d 1046, 1048-1049 (8th Cir.), cert. denied, 439 U.S. 852 (1978); *United States* v. *Mackedon*, 562 F.2d 103, 105 (1st Cir. 1977); *United States* v. *Martorano*, 557 F.2d 1, 11 (1st Cir.), aff'd on rehearing, 561 F.2d 406 (1977), cert. denied, 435 U.S. 922 (1978).

2. Petitioners Leonhardt (79-6245 Pet. 7-9) and Miller (79-6301 Pet. 4-7) also argue that there was insufficient evidence to sustain their convictions. This claim was, however, resolved against them by both courts below and does not merit further review. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

In fact, the evidence did demonstrate each petitioner's participation in the conspiracy. As the court below noted, the evidence at trial showed that petitioner Leonhardt possessed a stolen VIN plate that was later placed in a stolen van (Pet. App. A-11 to A-12). Leonhardt's house also served as the way station for the delivery of a stolen truck (*id.* at A-12). With respect to petitioner Miller, the evidence showed that he participated in the theft of a camper with Ronnie Adams and Clarence Morrison, who was at the center of the conspiracy. Miller changed the VIN plate on the camper prior to its transportation from California to Texas (*id.* at A-14 to A-15). In addition, Miller picked up at the airport the co-conspirators who were to drive the camper back to Texas (*id.* at A-15). Finally, Miller twice met with several other members of the scheme. At these meetings, the conspirators discussed how VIN plates would be obtained from the Mitchell and Wilson "wrecking yards" and determined that Miller, along with two others, would perform the actual alterations of the frame rails (*id.* at A-14). The evidence was sufficient to sustain both petitioners' convictions.[6]

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[6] Contrary to petitioner Miller's contention (79-6301 Pet. 4-5), the evidence likewise demonstrated a single conspiracy. As the court below observed (Pet. App. A-29):

> [The evidence] convinces us that the Government proved that all Appellants engaged in a number of diverse activities performed to achieve a single goal. In our view, each Appellant inferentially, if not actually, knew that the ultimate object of the conspiracy depended on the successful operation of each link in the chain. The links

in this conspiracy were clearly established and welded together in order to achieve a single goal—that of theft and interstate transportation of motor vehicles.

Petitioner Miller's reliance (79-6301 Pet. 5) on *United States* v. *Wilson*, 506 F.2d 1252 (7th Cir. 1974), and *United States* v. *Varelli*, 407 F.2d 735 (7th Cir. 1969), is misplaced, for those cases did not require proof that each conspirator knew the existence and role of every other conspirator. Rather, they merely recognize the settled proposition that a defendant must be aware that there are other conspirators and that the venture requires their participation. *Blumenthal* v. *United States*, 332 U.S. 539, 549-550 (1947); *United States* v. *Parnell*, 581 F.2d 1374, 1382 (10th Cir. 1978), cert. denied, 439 U.S. 1076 (1979); *United States* v. *Perez*, 489 F.2d 51, 62-64 (5th Cir. 1973), cert. denied, 417 U.S. 945 (1974).

What we have said concerning petitioner Miller's multiple conspiracy claim also largely disposes of his contention (79-6301 Pet. 3-4) that he should have been granted a separate trial. Since the evidence showed a single conspiracy, the trial court was under no obligation to grant a severance absent a showing of prejudice. Here petitioner makes only a vague claim that the evidence against some co-defendants was stronger than the case against him and must have unfairly affected the jury's determination of his own guilt. But the jury was obviously able to compartmentalize the evidence, for it acquitted a co-defendant (Iskowitz). *United States* v. *Gibbons*, 607 F.2d 1320, 1331 (10th Cir. 1979); *United States* v. *Kaplan*, 554 F.2d 958, 967 (9th Cir.), cert. denied, 434 U.S. 956 (1977). Accordingly, since no prejudice was shown, the trial court was well within its discretion in denying petitioner's motion for severance. *United States* v. *Adams*, 581 F.2d 193, 198 (9th Cir.), cert. denied, 439 U.S. 1006 (1978); *United States* v. *Weir*, 575 F.2d 668, 672 (8th Cir. 1978).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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